125 (3)

No. 08-953

In The

Supreme Court of the United States

TERRANCE ROLLAND,

Petitioner,

vs.

TEXTRON, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF BY PETITIONER

CHARLES C. STEBBINS, III
WARLICK, TRITT, STEBBINS & MURRAY, LLP
699 Broad Street, Suite 1500
Augusta, Georgia 30901-1454
(706) 722-7543
Counsel of Record
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

The only matter raised in Respondent's brief that requires reply is its assertion at page 13 that Petitioner failed in the district court properly to preserve his Question 2 sought to be presented in this Court. This is Petitioner's contention that, if Respondent's misrepresentations to him were not made in its fiduciary capacity, his state law fraud claim against Respondent is not preempted.

The opinion of the Court of Appeals below addressed Petitioner's Question 2 on the merits and gave no attention at all to any supposed waiver of this legal argument by Petitioner. The Record does not support Respondent's claim (page 13 of its brief in this Court) that "[a]t summary judgment Rolland [Petitioner] conceded his state law fraud claims were preempted." In the interest of both efficiency and candor with the district court, Petitioner has always acknowledged that, if he has a claim for misrepresentation by an ERISA fiduciary, he cannot also have a state law claim for the same wrong. In no way has Petitioner conceded that, if ERISA does not even cover Respondent's misrepresentation, because Respondent did not act as a fiduciary in defrauding Petitioner, still ERISA preempts his state law remedy. Were there even a colorable argument that he had done so, one would have expected that the Court of Appeals would at least have adverted to it.

The district court dismissed Rolland's state law fraud claim on summary judgment, on the basis of what it considered to be binding precedent, as a matter of law. It would have been improper for Rolland to have

tried to raise this issue subsequently at trial or through Rules 52(b) or 59, Federal Rules of Civil Procedure, as Respondent now claims to think Petitioner should have done. Neither of these rules is applicable to a question of law such as presented here.

To speak frankly, Petitioner is unable to understand Respondent's contention in this regard. Two of the three cases cited by Respondent have nothing to do with post-judgment motions of any kind, so far as Petitioner can see. The third, *Unitherm Food System, Inc. v. Swift-Eckrich, Inc,* 546 U.S. 394 (2006), addresses whether a motion based on insufficiency of evidence must be renewed after judgment in order to preserve such insufficiency as an appeal issue, a question which has nothing to do with anything involved in the present action.

Respectfully submitted,

CHARLES C. STEBBINS, III
Counsel of Record
Attorney for Petitioner
WARLICK, TRITT, STEBBINS
& MURRAY, LLP
699 Broad Street, Suite 1500
Augusta, Georgia 30901-1454
(706) 722-7543